IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et al.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**05-CV-0329 GKF-PJC**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

DEFENDANT PETERSON FARMS, INC.'S REPLY IN SUPPORT OF ITS MOTION IN LIMINE SEEKING TO EXCLUDE EVIDENCE PURSUANT TO, *INTER ALIA*, FEDERAL RULE OF EVIDENCE 403 [Dkt. 2397]

Defendant Peterson Farms, Inc., ("Peterson") hereby submits its Reply in Support of its Motion in Limine Seeking to Exclude Evidence Pursuant to, *inter alia*, Federal Rule of Evidence 403 (Dkt. #2397) ("Peterson's Motion") and in opposition to Plaintiffs' Response thereto (Dkt. #2509), requesting the Court to exclude the evidence, testimony, references, attorney statements, and arguments as discussed in Peterson's Motion and as further discussed herein.[1]

I. References to Defendants' or Peterson's Operations or Peterson's Continuing Operations Should be Excluded from Evidence at Trial

Peterson seeks to exclude general references to Defendants' or Peterson's operations within the Illinois River Watershed ("IRW"), when the operations being referenced are those of independent farmers and ranchers in the IRW. Peterson does not now own and has never owned

[1] Since Plaintiffs have engaged in the unfortunate practice of incorporating other briefs into their Response, *cf. Mazzio's Corp. v. Bright*, 46 P.3d 201, 204-05 (Okla. Ct. App. 2002) (striking portions of brief incorporating multiple arguments by reference to other filings), Peterson has little choice but to incorporate by reference the Reply briefs filed by the various Defendants in support of the following Motions in Limine: Dkt. #2393, Dkt. #2399, Dkt. #2404, Dkt. #2407, Dkt. # 2412, Dkt. #2414, and Dkt. #2430. For the Court's reference, the applicable docket numbers are included in the heading of the argument to which they apply.

any poultry operation in the IRW. Thus, any reference to the contrary is argumentative and not competent evidence, *see* Fed. R. Evid. 601, and would, if allowed, mislead the fact finder and confuse the issues to be considered by the fact finder. *See* Fed. R. Evid. 403. That other Defendants may now own or previously have owned poultry operations in the IRW does not permit Plaintiffs to suggest that Peterson has operations in the watershed, regardless of the theory on which they rely. Indeed, that other Defendants may have operations in the IRW further demonstrates the prejudicial nature and inadmissibility of the statements and testimony at issue with respect to Peterson.

Additionally, to the extent that Plaintiffs offer any testimony, expert or otherwise, or evidence based upon their untenable mix of agency law, vicarious liability, and *Restatement (Second) of Torts* §427B in an attempt to transmute the private farms of Peterson's former contract growers and wholly independent ranchers into "Peterson's operations" within the IRW, such statements are inadmissible because they improperly invade the province of the Court, insofar as the statements amount to an ultimate legal conclusion, regarding the ownership or control of the subject operation. *See* Fed. R. Evid. 704; JOHN W. STRONG, MCCORMICK ON EVIDENCE §§ 12, 335 (4th ed. 1992) (noting prohibition on ultimate opinion on a question of law). As such, Plaintiffs should be prohibited from referring to "Peterson's operations" or using similar references, which are false, amount to legal conclusions or would mislead or confuse the factfinder.

II. J. Berton Fisher's "History" of Peterson should be Excluded from Evidence at Trial

Peterson seeks to exclude any testimony of Plaintiffs' expert witness J. Berton Fisher, Ph.D., regarding the corporate history of Peterson, which is contained within Dr. Fisher's expert report submitted in this matter. Plaintiffs do not dispute that allowing Dr. Fisher to testify about the corporate history of Peterson Farms is inappropriate because, by Fisher's own admission, it is outside of his personal knowledge, *see* Fed. R. Evid. 602; that such factual testimony does not require the endorsement of an expert witness, *see* Fed. R. Evid. 702; and that the probative value of allowing an expert to testify on these factual issues is outweighed by the unfair prejudice to Peterson, insofar as a fact finder may give more weight to an expert endorsement of the facts than they are entitled, *see* Fed. R. Evid. 403.

Instead, Plaintiffs rely upon an exception to the hearsay rule for their contention that Dr. Fisher is qualified to testify about Peterson's corporate history. Plaintiffs contend, without any support, that *Lloyd Peterson and Peterson Industries: An American Story*, written by author Huey Crisp (*see* http://lccn.loc.gov/89033592), is a learned treatise and, therefore, qualifies as an exception to the hearsay rule per Federal Rule of Evidence 803(18). Learned treatises are "written primarily and impartially for professionals, subject to scrutiny and exposure for inaccuracy, with the reputation of the writer at stake." Fed. R. Evid. 803(18) advisory committee note; *see also*, *Baker v. Barnhart* 457 F.3d 882, 891 (8th Cir. 2006) (citing the advisory committee note); *U.S. v. Jones*, 712 F. 2d 115, 121 (5th Cir. 1983) ("The learned treatise doctrine is confined to published works that have been subjected to widespread collegial scrutiny.").

In contrast to the requirements of Rule 803(18), *Lloyd Peterson and Peterson Industries: An American Story* is an out-of-print regionally-published book that is tantamount to a personal memoir. Plaintiffs have not, and cannot, contend that this book was written primarily for review

by professional historians or that it has undergone widespread scrutiny among the academic community. Thus, Plaintiffs' contention that this self-published book qualifies as a learned treatise under Federal Rule of Evidence 803(18) must fail. As a result, and for the reasons stated in Peterson's Motion, the Court should prohibit Dr. Fisher from testifying on non-expert issues admittedly outside of his personal knowledge such as the history of Peterson and its operations.

III. Collective References to Defendants' Grower Contracts Should be Excluded From Evidence at Trial

Peterson seeks to exclude any collective reference, inferences or testimony to the various Defendants' grower contracts. Plaintiffs admit that Peterson's contract is unique compared with every other Defendant's contract in this case and that it has been for at least the past decade. Dkt. #2509 at 5. Nevertheless, Plaintiffs argue the alleged similarities between the various Defendants' contracts and ignore the numerous examples of specific differences that Peterson identified in its Motion, and which Plaintiffs admit exist. Therefore, any collective reference, inference or testimony to Defendants' contracts is not competent evidence, *see* Fed. R. Evid. 601, and would, if allowed, mislead a fact finder and confuse the issues to be considered by a fact finder, s*ee* Fed. R. Evid. 403.

The primary difference between the various Defendants' contracts that Plaintiffs discussed in their Response is the fact that Peterson is the only Defendant whose contracts specifically acknowledge that the individual farmers owned and retained ownership of their litter. Although Plaintiffs concede this fact, they sidestep the issue raised by Peterson and contrive a tangential argument that the aforementioned contractual provision is a purported admission by Peterson that it owned the litter prior to the contract modification. Notably,

Plaintiffs fail to cite any legal authority to support their spurious position and fail to note that the Defendants have already successfully debunked this argument in a previous filing. *See* Dkt # 2033, at 23 n. 12 (discussing that ownership of litter vests according to custom and usage).

By way of review, the 1999 contract modification was merely a written acknowledgement of an already existing relationship. Any cursory review of the course of dealing between Peterson and its former contract growers clearly reflects that the growers have always retained ownership of their litter and that the litter was valuable consideration supporting the contractual relationship between Peterson and its former growers. The 1999 contract modification was merely the written embodiment of this practice. Simply stated, Peterson's former contract growers have always owned their litter and any unsupported argument by Plaintiffs to the contrary should be ignored for purposes of the relief now sought and further prohibited at trial.

The uncontroverted evidence, as well as Plaintiffs' concessions, establishes that Peterson's contracts are unique. As such, Plaintiffs should be prohibited from making any collective references or inferences or offering any testimony suggesting that Defendants' contracts with their respective contract growers contains the same language, terms or requirements as the contracts of other Defendants.

IV. Attributing Other Defendants' Statements or Documents to Peterson Should be Excluded From Evidence at Trial [2393, 2399, 2412, 2547]

Peterson seeks to exclude Plaintiffs' use of statements, testimony or evidence pertaining to other, separate Defendants against Peterson. The blanket use of any such statements, testimony or evidence is inadmissible under Federal Rule of Evidence 403, because it is unfairly

prejudicial to all parties not associated with the evidence or statements, confuses the issues, and, therefore, all such statement are inadmissible under Federal Rule of Evidence 403.

Peterson's Motion provides multiple examples where Plaintiffs attribute testimony related to other Defendants' to Peterson. In response, Plaintiffs assert an unsupported argument that the existence of a joint defense agreement entered by the various Defendants, along with their theories of joint and several liability and its various off-shoots, somehow obviates their obligation to provide specific, individualized proof as to the alleged harms caused by Peterson. As discussed in Defendants' *Motion for Partial Summary Judgment Dismissing Counts 1, 2, 3, 4, 5, 6, and 10* (Dkt #2069) and Peterson's Motion, Plaintiffs have the affirmative burden to prove their claims against each, individual Defendant. That joint and several liability may apply, if Plaintiffs prove their claims individually against each separate Defendant, does not excuse them of their initial, individualized burden of proof. Similarly, the mere existence of a joint defense agreement does not relieve them of this burden.

Likewise misplaced is Plaintiffs' assertion that any confusion they create by indiscriminately referring to all of the Defendants can be sorted out by the Defendants during cross-examination. This is clearly an attempt by Plaintiffs to shift their burden of proof to the Defendants by requiring the Defendants to disprove Plaintiffs' blanket assertions. Moreover, Plaintiffs' contention is effectively a concession that collective references should be excluded under Rule 403. Therefore, although Plaintiffs would like to have the ability to attribute evidence or statements by one Defendant to the entire group of Defendants, such a practice is impermissible under Federal Rule of Evidence 403 because it is misleading and, therefore, unfairly prejudicial to Peterson.

V. References to Defendants' or Peterson's Purported Knowledge and Reference to Industry Groups Should be Excluded From Evidence at Trial [2414, 2430]

Peterson seeks to exclude general references to its purported knowledge of environmental issues claimed to be related to management of poultry litter, without competent evidence that Peterson actually possessed such knowledge. Throughout these proceedings Plaintiffs have sought to attribute the mere existence of a document or publication or industry group as the knowledge of Peterson. Plaintiffs have continually done so without establishing any foundation for such an assertion and, therefore, without a proper foundation the probative value of any such assertion is substantially outweighed by the danger of unfair prejudice. *See* Fed. R. Evid. 403.

Plaintiffs have failed to proffer any evidence establishing that any of Peterson's former employees or agents received actual notice or acquired any knowledge of information that Plaintiffs' now seek to attribute to Peterson. Nevertheless, Plaintiffs assert, without evidentiary support, that because "Peterson attended industry wide conferences, workshops and symposia and participated in the membership of various industry wide associations through its employees, agents, and officers" that any such information presented therewith can be attributed to Peterson. Dkt. #2509 at 13. In support of their position, Plaintiffs' cite *Operators Royalty & Producing Co. v. Greene*, 49 P.2d 499, 502 (Okla. 1935). *Operators Royalty*, however, requires a showing that a corporate officer or agent "receive[d] notice or acquire[d] knowledge" before any such knowledge can be imputed to the corporation. *Id.* Plaintiffs have thus far failed to prove what knowledge, if any, Peterson's former employees received and/or acquired at any trade shows or through membership in any trade groups. If Plaintiffs cannot establish the requisite foundation

to these types of contentions, the Court should prohibit Plaintiffs' speculation and preclude Plaintiffs from making any references attempting to impute such "knowledge" to Peterson.

VI. Reference to Concentrated Animal Feeding Operations Should be Excluded or Appropriately Limited at Trial [2404, 2543]

Peterson seeks to exclude any reference to any poultry feeding operation in the IRW formerly under contract with it as either a "confined animal feeding operation" or a "CAFO," since such references are inadmissible under, *inter alia*, Federal Rules of Evidence 401 and 403. In their response, Plaintiffs offer to cure any possible confusion or prejudice by offering to use the terms "Concentrated Animal Feeding Operation" or "CAFO" only in their "generic sense – as opposed to in a statutory definitional sense." Plaintiffs' further explained that they will not "refer to any poultry operation in the IRW as a 'Concentrated Animal Feeding Operation'" but may "refer[] to poultry operations in the IRW as "concentrated animal feeding operations.'" *See* Dkt. #2493 at 2. Plaintiffs' response fails to address the issues raised by Peterson and, quite literally, only confuses the issue. *See* Fed. R. Evid. 403. To the extent that Plaintiffs contend to use terms that are inherently prejudicial and pejorative against Peterson only in their "generic sense," such an offer is disingenuous at best. *See also* Dkt. #2543. Plaintiffs clearly understand the prejudicial effect that these terms have and, therefore, the Court should prohibit them from referring to any of Peterson's former contract growers as either a "concentrated animal feeding operation" or "CAFO."

VII. Testimony Regarding Pathogens in Litter Associated with Peterson Should be Limited at Trial

Peterson seeks to exclude any generalized reference to pathogens in waters of the state from poultry litter associated with Peterson or any poultry grower formerly under contract with

it. Plaintiffs have not developed evidence linking pathogens in waters of the state to poultry litter associated with Peterson or any of its former contract growers. Instead, Plaintiffs seek to rely upon "common sense and the laws of physics" to prove their case against Peterson. Expedient as it may be to rely on notions of "common sense," such "evidence" is inadmissible under Federal Rule of Evidence 403 because it lacks probative value and, is likely to confuse the issues to be decided by a fact finder. *See* Fed. R. Evid. 403.

In support of its Motion, Peterson submitted *all* of the pertinent sampling data collected by Plaintiffs for Peterson's former contract growers. The data demonstrates that Plaintiffs did not find any pathogen in litter from these operations. In response to their own data, Plaintiffs cite numerous "authorities" for the proposition that some lines of indicator bacteria can cause human illness. However, Plaintiffs did not represent that these particular bacteria were found in any of the sampling conducted at the former growers' operations, because—as stated in Peterson's Motion—pathogens were not identified at these operations. Plaintiffs cannot simply ignore their evidence in favor of "WebMD" and other unsponsored authorities simply because the direct evidence fails to support their position. Indeed, the absence of pathogens from the samples iscan only lead to one "common sense" conclusion—the source of the pathogens could *not* be the litter that the Plaintiffs sampled from Peterson's former contract growers' farms.

Furthermore, to the extent that Plaintiffs contend that they can rely upon circumstantial evidence to prove their case, such circumstantial evidence must somehow connect Peterson to the alleged injury. The "common sense and the laws of physics" approach taken by Plaintiffs' in their Response does not, circumstantially or otherwise, link Peterson or its former growers to pathogens found in any location, including the waters of the IRW. As such, the Court should

exclude all generalized references to pathogens in waters of the state from poultry litter associated with Peterson or any poultry grower formerly under contract with it.

VIII. Collective References to Defendants' Waste Should be Excluded From Evidence at Trial [2407]

Peterson seeks to exclude any reference to Defendant's or Peterson's "waste" when the undisputed facts show that Peterson's former independent contract poultry growers have always owned all of the poultry litter generated on their respective farms. Therefore, any reference to Peterson's "waste" or litter are not supported by competent evidence, unfairly prejudicial, argumentative and likely to confuse and mislead a fact finder. *See* Fed. R. Evid. 403. Plaintiffs' only response to this issue is to recycle its two untenable arguments that it already advanced in response to Peterson's Motion. As discussed in Section III, *supra*, the argument regarding Peterson's contract must fail because it is unsupported in law or in fact. The 1999 contract modification was no more than a written acknowledgement of a course of dealing that had been in place between Peterson and its contract growers since Peterson's inception. Second, Plaintiffs re-urge their untenable argument that Peterson is liable for all of the actions of its former independent contract growers by way of vicarious liability and/or agency theory. As discussed in Section I, *supra*, the Court should disallow any such testimony, reference, discussion or inference because such statements are inadmissible legal conclusions.

IX. Conclusion

For the reasons stated herein, Defendant Peterson Farms, Inc. requests the Court for an Order excluding and/or limiting use of the foregoing categories of evidentiary materials, including any and all testimony, references, attorney statements or arguments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 1st day of September, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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